

21 DECEMBER 2017

Supplemental Agreement
relating to
Heathrow Airport Limited's and Heathrow Express Operating Company
Limited's involvement in the construction of the
HS2 project and the Network Code

Network Rail Infrastructure Limited ⁽¹⁾
Heathrow Airport Limited ⁽²⁾ and
Heathrow Express Operating Company Limited ⁽³⁾

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DATED 21 DECEMBER 2017

PARTIES

- (1) **Network Rail Infrastructure Limited**, a company incorporated under the laws of England with company registration number 02904587 and whose registered office is at 1 Eversholt Street, London NW1 2DN ("**Network Rail**"); and
- (2) **Heathrow Airport Limited**, a company incorporated under the laws of England with company registration number 01991017 and whose registered office is at The Compass Centre, Nelson Road, London Heathrow Airport, Hounslow TW6 2GW ("**HAL**"); and
- (3) **Heathrow Express Operating Company Limited** (in its capacity as operator of the HEX Services), a company incorporated under the laws of England with company registration number 03145133 and whose registered office is at The Compass Centre, Nelson Road, London Heathrow Airport, Hounslow TW6 2GW ("**HEOC**"),

together, the "**Parties**".

BACKGROUND

- (A) The British Railways Board ("**BRB**") and HAL entered into a track access agreement dated 16 August 1993 which was subsequently amended by four supplemental agreements and a [REDACTED] 2008 (the "**HEX TAA**").
- (B) Further to various transfer schemes and agreements: (i) the rights, obligations and liabilities of BRB under the HEX TAA have been transferred to Network Rail, and (ii) the rights of HAL under the HEX TAA have been assigned, and the obligations of HAL under the HEX TAA have been sub-contracted, to HEOC.
- (C) The Parties recognise that the exercise of certain rights and the compliance with certain obligations pursuant to the HEX TAA may affect the HS2 Project.
- (D) In order to enable and facilitate the implementation of the HS2 Project, the Parties (and the Secretary of State for Transport) are [REDACTED] arising under or in connection with the HEX TAA.
- (E) In consideration for entering into the [REDACTED] the Parties are entering into this Agreement to enable HAL and HEOC to participate in and be bound by various procedures of the Network Code in respect of the planning of the HS2 Works, the taking of HS2-related Restrictions of Use, changes to the Engineering Access Statement and the Timetable Planning Rules, Network Changes and Disruptive Events.
- (F) Whilst the HEX TAA is an unregulated access contract, the Parties agree that any dispute relating to the application of certain parts of the Network Code under this Agreement to the HEX TAA will be subject to an appeals mechanism to the ORR.

AGREED TERMS

1. DEFINITIONS AND INTERPRETATION

1.1 Incorporation of defined terms and principles of interpretation

- 1.1.1 Unless the context otherwise requires, words and expressions defined and references construed in the Network Code shall have the same meanings and construction in this Agreement.
- 1.1.2 Unless otherwise specified, a reference to a Clause is a reference to a clause in this Agreement.

1.2 Definitions

In this Agreement:

"ADRR" has the meaning specified in Clause 7.2.

[REDACTED]

"HEX Services" means the passenger rail services operated in accordance with the HEX TAA and "HEX Service" means any one of them.

"HS2 Act" means the High Speed Rail (London – West Midlands) Act 2017.

[REDACTED]

"HS2 Project" means the project authorised by the HS2 Act.

"HS2 Works" means the works required for the HS2 Project.

"HS2 Works Completion Date" has the meaning ascribed to it in the HS2 [REDACTED]

"Infrastructure" has the meaning ascribed to it in the HEX TAA.

"Insolvency Event" means an event in relation to either Party to this Agreement (a "Relevant Entity") where:

- (a) any step, which has a reasonable prospect of success, is taken by any person with a view to its administration under Part II of the Insolvency Act 1986;
- (b) it stops or suspends or threatens to stop or suspend payment of all or a material part of its debts, or is unable to pay its debts, or is deemed unable to pay its debts under section 123(1) or (2) of the Insolvency Act 1986, except that in the interpretation of this paragraph:
 - (i) section 123(1)(a) of the Insolvency Act 1986 shall have effect as if for "£750" there were substituted "£100,000" or such higher figure as the Parties may agree in writing from time to time; and
 - (ii) it shall not be deemed to be unable to pay its debts for the purposes of this paragraph if any such demand as is mentioned in section 123(1)(a) of the Insolvency Act 1986 is satisfied before the expiry of 21 days from such demand;
- (c) the directors of a Relevant Entity make any proposal under section 1 of the Insolvency Act 1986, or a Relevant Entity makes any agreement for the deferral, rescheduling or other readjustment (or makes a general assignment or an arrangement or composition with or for the benefit of the relevant creditors) of all or a material part of its debts, or a moratorium is agreed or declared in respect of, or affecting all or a material part of, its debts;
- (d) any step is taken to enforce security over, or a distress, execution or other similar process is levied or sued out against, the whole or a substantial part of its assets or undertaking, including the appointment of a receiver, administrative receiver, manager or similar person to enforce that security;
- (e) any step is taken by any person with a view to its winding-up or any person presents a winding-up petition which is not dismissed within 14 days, or it ceases or threatens

to cease to carry on all or a material part of its business, except for the purpose of and followed by a reconstruction, amalgamation, reorganisation, merger or consolidation on terms approved by the other Relevant Entity before that step is taken (which approval shall not be unreasonably withheld or delayed); or

- (f) any event occurs which, under the law of any relevant jurisdiction, has an analogous or equivalent effect to any of the events listed above,

unless in the case of paragraphs (a), (d) and (e) of this definition, the relevant petition, proceeding or other step is being actively contested in good faith by the Relevant Entity with timely recourse to all appropriate measures and procedures.

“Network Code” means the document by that name as amended or approved by the ORR from time to time and published by Network Rail.

“Network Licence” means the network licence (as amended from time to time) granted to Network Rail in accordance with section 8 of the Railways Act 1993 (as amended).

“ORR” means the Office of Rail and Road.

“Performance Order” has the meaning ascribed to it in Clause 7.4.2.

“Relevant Period” means the period starting from the date of this Agreement and ending on the HS2 Works Completion Date.

“Restriction of Use” shall have the meaning ascribed to it in the model passenger track access agreement published by the ORR from time to time.

“Suitable Transferee” means one or more third parties authorised and capable of safely and properly operating the Heathrow Express Services.

- 1.3 References to any enactment or legislation are to be construed as references to the enactment or legislation as amended by any subsequent enactment or legislation or as contained in any subsequent re-enactment, modification or statutory extension of the enactment or the legislation.
- 1.4 Except where the context requires otherwise, the singular includes the plural and vice versa; words denoting persons include firms and corporations and vice versa; and a reference to one gender includes the other.
- 1.5 Headings are included in this Agreement for ease of reference only and do not affect its interpretation or construction.
- 1.6 The words “include” or “including” are to be construed without limitation to the words following.
- 1.7 Any reference to HAL, HEOC or Network Rail includes a reference to any successor in title to that or those bodies.
- 1.8 References to any agreement, deed, instrument, licence, code or other document shall be construed at the particular time, as a reference to that agreement, deed, instrument, licence, code or other document as the same may then have been amended, varied, supplemented or novated.
- 1.9 **Scope of this Agreement**
 - 1.9.1 Notwithstanding any other provision of this Agreement, the Parties acknowledge and agree that this Agreement applies only to the construction of the HS2 Works and carrying out of related operations which:
 - (a) are carried out on the Infrastructure; and/or

(b) have an impact upon, or will or may have an impact upon, the Infrastructure.

1.9.2 This Agreement does not apply to:

(a) the construction of the HS2 Works and carrying out of related operations other than as described in Clause 1.9.1; or

(b) any inconsistencies between the HEX TAA and the operation of or permanent existence of the HS2 Works once completed.

1.9.3 The Parties acknowledge and agree that a separate agreement or agreements will be needed to address the matters referred to in Clause 1.9.2.

2. MUTUAL UNDERTAKINGS

2.1 Each Party agrees that the following parts of the Network Code (but only those parts) are incorporated into and form part of this Agreement for the purpose of any Restriction of Use, any change to the Engineering Access Statement or the Timetable Planning Rules or any Network Change or any Disruptive Event connected to the HS2 Works and to comply with and have the benefit of any rights contained in, the following parts of the Network Code (but only those parts) during the Relevant Period:

2.1.1 Part A (General Provisions) to the extent required for the purposes of interpreting those Parts of the Network Code referred to in Clauses 2.1.2 to 2.1.5 but excluding Condition A1.1(h);

2.1.2 Part D (Timetable Change);

2.1.3 subject to Clause 2.2, Part G (Network Change);

2.1.4 Part H (Operational Disruption); and

2.1.5 Part M (Appeals);

and it is agreed, for the purposes of this Agreement, that HAL and HEOC shall (each, as the context may require) be deemed to be a "Train Operator" and the HEX TAA shall be deemed to be an "Access Agreement".

2.2 The Parties agree that no compensation will be payable and no costs shall be reimbursed by Network Rail to HAL or HEOC under Part G of the Network Code as incorporated into this Agreement in accordance with Clause 2.1.3.

2.3 For the purposes of this Agreement, HAL and HEOC (as the context may require) undertake to Network Rail to be bound by the provisions of Part D of the Network Code as a Timetable Participant and Network Rail accepts that HAL and HEOC shall each be deemed to be a Timetable Participant.

2.4 The Parties agree that:

2.4.1 the agreement or determination of any Restriction of Use or any changes to the Engineering Access Statement or the Timetable Planning Rules, or any Network Change; or

2.4.2 the occurrence and consequences of any Disruptive Event,

in accordance with this Clause 2 shall be binding on the Parties notwithstanding any provision of the HEX TAA.

2.5 The Parties agree:

2.5.1 to have regard to any definition or condition of any Part of the Network Code in order to assist the interpretation of those Parts of the Network Code listed in Clause 2.1;

- 2.5.2 to disregard any conditions of those Parts of the Network Code listed in Clause 2.1 or any other parts of the Network Code which are not relevant or reasonably necessary for the implementation of the HS2 Project and in particular the programming and taking of any Restriction of Use, any changes to the Engineering Access Statement or the Timetable Planning Rules, and the implementation of any Network Change in connection with the HS2 Project or the management of any Disruptive Event; and
- 2.5.3 that in the event of any conflict between the [REDACTED] the HEX TAA, [REDACTED] this Agreement during the Relevant Period, the following order of precedence shall apply notwithstanding any provision in the Network Code or the HEX TAA to the contrary:
- (a) Clause 1.9 of this Agreement;
 - (b) Clauses 1.2 and 2 of this Agreement and clause 3.7 (excluding clauses 3.7.2 to 3.7.6 inclusive) [REDACTED]
 - (c) those parts of the Network Code listed under Clause 2;
 - (d) this Agreement (save for Clauses 1.2 and 2);
 - (e) [REDACTED]
 - (f) the HEX TAA.

3. TERMINATION

3.1 This Agreement shall terminate in the following circumstances:

- 3.1.1 an Insolvency Event occurs in relation to the Secretary of State for Transport or any entity to whom the HS2 Project has been transferred;
- 3.1.2 the HEX TAA expires or is terminated in accordance with clauses 35 and 36 (respectively) of the HEX TAA.

4. MISCELLANEOUS

4.1 Waiver and Invalidity

- 4.1.1 The failure to exercise or delay in exercising any right or remedy under this Agreement shall not constitute a waiver of that right or remedy or a waiver of any other rights or remedies and no single or partial exercise of any right or remedy under this Agreement shall prevent further exercise of that right or remedy or the exercise of any other right or remedy.
- 4.1.2 In the event that any provision of this Agreement is held to be invalid, illegal or unenforceable for any reason, such provision shall be severed and the remainder of the provisions shall continue in full force and effect as if this Agreement has been executed without the invalid provision.

4.2 No assignment without consent

Except as set out in Clause 4.3, no Party may assign its rights and obligations under this Agreement without the consent of the other Parties, such consent not to be unreasonably withheld or delayed.

4.3 Assignment to Suitable Transferee

HAL and HEOC may each assign their rights under this Agreement to a Suitable Transferee to whom the HEX TAA has been novated.

4.4 Service of notices and documents

4.4.1 Any notice or other document required to be given under this Agreement or any communication between the Parties with respect to any of the provisions of this Agreement shall be in writing in English and be deemed duly given if signed in accordance with this Agreement by or on behalf of the Party giving the notice and delivered by hand, sent by pre-paid first class recorded delivery post or by email to the relevant postal or email address set out in Clause 4.4.4 below.

4.4.2 Any such notice shall be deemed to be given to and received by the addressee:

- (a) if sent by hand or by recorded delivery at the time the same is delivered to the address of the addressee and a receipt is given;
- (b) if sent by email, at the time evidenced by the electronic message delivery receipt.

4.4.3 If in Clause 4.4.4 there is specified any person to whom copies of notices shall also be sent, the Party serving a notice in the manner required by this Clause 4.4 shall send a copy of the notice in question to such person at the address for serving copies as specified in Clause 4.4.4. Such copy notice shall be sent at the same time as the original notice.

4.4.4 HEOC's address for the service of notices is:

Heathrow Express Operating Company Limited
The Compass Centre
Nelson Road
London Heathrow Airport
Hounslow TW6 2GW

All written notices to be marked:

"URGENT: ATTENTION THE COMPANY SECRETARY"

HAL's address for the service of notices is:

Heathrow Airport Limited
The Compass Centre
Nelson Road
London Heathrow Airport
Hounslow TW6 2GW

All written notices to be marked:

"URGENT: ATTENTION THE COMPANY SECRETARY"

Network Rail's address for the service of notices is:

Network Rail Infrastructure Limited
1 Eversholt Street
London NW1 2DN
Email: notices@networkrail.co.uk

All written notices to be marked:

"URGENT: ATTENTION THE GROUP COMPANY SECRETARY"

and copied to:

Customer Account Manager - Heathrow Express
Network Rail
Western House
6th Floor
1 Holbrook Way
Swindon SN1 1BD

4.4.5 Each Party shall be entitled to amend in any respect the communication particulars which relate to it and which are set out in Clause 4.4.4. Any such amendment shall be made only by notice given to the other Party in accordance with this Clause 4.4.

4.5 Counterparts

This Agreement may be executed in any number of counterparts, and this has the same effect as if the signatures on the counterparts were on a single copy of this Agreement.

4.6 Third party rights

A person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or enjoy the benefit of any term of this Agreement.

5. GOVERNING LAW

This Agreement and any issues or disputes arising out of or in connection with it shall be governed by and construed in accordance with English law.

6. PERFORMANCE ORDER

6.1 In relation to any breach of this Agreement:

6.1.1 the innocent Party shall be entitled to apply under Clause 4.3 for a Performance Order against the Party in breach; and

6.1.2 if a Performance Order is made, the Party against whom it has been made shall comply with it.

7. DISPUTE RESOLUTION

7.1 Disputes

7.1.1 In the event of a dispute between the Parties arising out of or in connection with this Agreement (a "Dispute"), either Party may serve written notice on the other Party that a Dispute has arisen (a "Notice of Dispute").

7.1.2 The Parties shall use all reasonable endeavours for a period of 30 days from the date on which the Notice of Dispute is served on the other Party (or such longer period as may be agreed in writing between the Parties) to resolve the Dispute by amicable negotiation.

7.1.3 If a Dispute is not resolved in accordance with Clause 7.1.2, it shall be referred to the chief executive officer (in the case of HAL or HEOC) and member of the Executive Committee (in the case of Network Rail), to resolve the Dispute by amicable negotiation, for a period of 30 days from the expiry of the period prescribed in Clause 7.1.2 (or such longer period as may be agreed in writing between the relevant Parties).

7.2 ADRR

Any Dispute, which is not resolved within the time periods set out in Clause 7.1.3, may be referred for resolution in accordance with the Access Dispute Resolution Rules in force at the time of the reference (the "ADRR"), upon either Party serving written notice.

7.3 Related Disputes and Consolidation of Disputes

7.3.1 If any dispute arises under the [REDACTED] which raises issues substantially the same as, or connected with issues raised in a Dispute which has already been referred to ADRR, or arises out of substantially the same facts as are the subject of a Dispute (in either case, a "Related Dispute"), the relevant body appointed to hear such Dispute, or to which such Dispute is referred shall also be appointed to hear any Related Dispute or, as the case may be, have such Related Dispute referred to it.

7.3.2 In order to facilitate the comprehensive and consistent resolution of Related Disputes, upon the request of any party to the Dispute, the relevant body appointed to hear the Dispute or, as the case may be to whom the Dispute has been referred may consolidate its proceedings for the Dispute with proceedings for any Related Dispute(s). The relevant body shall not consolidate such proceedings unless it determines that (i) a consolidated proceeding would be more efficient than separate proceedings and (ii) no party would be materially prejudiced as a result of such consolidation whether through undue delay or otherwise. The relevant body shall, after soliciting submissions from the parties, make such orders or directions as may be necessary or expedient for the orderly conduct of any consolidated arbitration proceedings.

7.4 Performance Orders

7.4.1 Power to order provisional relief

For the purposes of section 39 of the Arbitration Act 1996, should any Dispute be allocated in accordance with the ADRR to arbitration under Chapter F of the ADRR, the arbitrator shall have power to order on a provisional basis any relief which it would have power to grant in a final award, including Performance Orders.

7.4.2 Performance Orders

A Performance Order:

- (a) is an order made under Clause 7.4.3(b), relating to a Relevant Dispute, whether by way of interim or final relief; and
- (b) may be applied for by Network Rail, HAL or HEOC in the circumstances set out in Clause 6,

and an application for a Performance Order shall be without prejudice to any other remedy available to a Party under this Agreement (whether final or interim and whether by way of appeal under the Network Code or otherwise).

7.4.3 Duties of arbitrator in relation to Performance Orders

Without prejudice to any additional remedies that may be ordered by the arbitrator under Clause 7.5, where a Dispute is allocated in accordance with ADRR to arbitration and a Party has applied for a Performance Order the Parties shall agree in a Procedure Agreement (as defined in the ADRR):

- (a) the arbitrator shall decide as soon as possible whether the application is well founded or not; and

- (b) if the arbitrator decides that the application is well founded, it shall be required to make an interim or final declaration to that effect and, in that event, the arbitrator may also make any interim or final order directing any Party to do or to refrain from doing anything arising from such declaration which it considers just and reasonable in all the circumstances.

7.5 Remedies

The powers exercisable by the arbitrator as regards remedies shall include:

- 7.5.1 the powers specified in sections 48(3) to (5) of the Arbitration Act 1996;
- 7.5.2 the powers specified in the ADRR;
- 7.5.3 the power to make Performance Orders; and
- 7.5.4 the power to order within the same reference to arbitration any relief specified in Clauses 7.5.1, 7.5.2 and 7.5.3 consequent upon, or for the breach of, any interim or final Performance Order previously made.

7.6 Exclusion of applications on preliminary points of law

Any recourse to any court for the determination of a preliminary point of law arising in the course of the arbitration proceedings is excluded.

The Common Seal of **Network Rail Infrastructure Limited** was affixed in the presence of

SEAL NO
40131

Signature (Witness)

Handwritten signature

Print Name

Senior Assistant

Address

Authorised Signatory as approved
by a resolution of the board of
Network Rail Infrastructure Limited
on 19 October 2015
Company Secretary

Occupation

Signed by
duly authorised on behalf of **Heathrow Airport Limited**

.....

Signed by
duly authorised on behalf of **Heathrow Express Operating Company Limited**

.....

- (b) if the arbitrator decides that the application is well founded, it shall be required to make an interim or final declaration to that effect and, in that event, the arbitrator may also make any interim or final order directing any Party to do or to refrain from doing anything arising from such declaration which it considers just and reasonable in all the circumstances.

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The Common Seal of **Network Rail Infrastructure Limited** was affixed in the presence of

Signature (Witness)

Print Name

Address

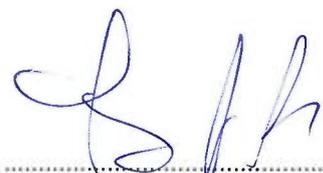
Occupation

Signed by
duly authorised on behalf of **Heathrow Airport Limited**



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Signed by
duly authorised on behalf of **Heathrow Express Operating Company Limited**



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